IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 667

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

JOSEPH S. GRAYDON, Cincinnati, Ohio,
BUFORD C. TYNES, Huntington, W. Va.,
Attorneys for Petitioner.

Of Counsel:
CADWALADER, WICKERSHAM & TAFT,
New York City.
MAXWELL & RAMSEY,
Cincinnati, Ohio.

LESLIE WHARTON PUBLISHER, CINCINNATI, OHIO

TOPICAL INDEX

LEGAL AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 667

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

This brief will be restricted to a clarification and rectification of certain statements and arguments found in respondent's brief, arranged under topical headings descriptive of the question involved and with appropriate references to the page and paragraph where discussed in respondent's brief.

TOPIC I

RESPONDENT'S ALLEGED "UNDERSTANDING" AND "IMPRESSION" AS TO LOCATION OF PETITIONER'S 100 ACRE TRACT.

Disregarding the numerous map and deed exhibits, produced by petitioner from respondent's files and relied upon

by petitioner as showing conclusively that respondent at all times had definite and specific knowledge of the precise location of petitioner's 100 acre tract, respondent's counsel seek to overcome the consequences to respondent of such precise knowledge, (a) by showing that respondent's President, Dudley, "always had the impression" that the tract was located elsewhere than where it actually is, and as so located lay wholly *without* the exterior bounds of respondent's Knott Coal Corporation leasehold, and (b), by their argument in the alternative (indeed, in contradiction) that the letter from Tynes to Dudley of February 3, 1923 was calculated to mislead Dudley into thinking that the tract was located at an entirely different point, and as so located was situated wholly *within* the exterior bounds of said leasehold.

A. Dudley's Impressionistic Location:

Commencing at the bottom of page 2, again at slightly below the middle of page 5, and still again at the top of page 7 of their brief, respondent's counsel argue that respondent's President, Dudley, believed that petitioner's tract was located on the Trace Fork of Irishman Creek, simply because he testified that that was his "impression". Inasmuch as respondent has thus planted its claim to innocency primarily, if not exclusively, on this alleged impression of Mr. Dudley, the evidence under this heading is of vital, indeed controlling, importance. We shall show, that in order to support its contention that Dudley did not know the true location of petitioner's tract, respondent has Dudley giving to the tract a location which he could not possibly have believed to be its real location.

At the oral argument in the Circuit Court of Appeals respondent's counsel stated, as they seem now to state,

that every inconsistency in the evidence on this score is removed, and the innocent character of the trespass established, by the acceptance of the following testimony of Mr. Dudley (Tr. Vol. II, p. 69), viz:

> "I always had the *impression* and *understanding*, talking to Mr. Tynes, that that tract of land laid over on Trace Fork of Irishman's Creek, and that I could not acquire it from him."

"*Always*", even when on June 4, 1929 (*after* petitioner's attorneys Nickell and Tynes had confronted him with their discovery of the trespass during the preceeding month of May) Dudley wrote the President of Knott Coal Corporation the unequivocal and all-conclusive letter reproduced at page 22 of our petition and supporting brief! "*Always*", even (or so respondent's counsel argued) up until some unstated date after respondent had filed its original answer to petitioner's original bill of complaint and had found it expedient to alter its plan of defense! It follows, therefore, that if this testimony of Dudley—being *his* explanation of his own personal misunderstanding as to the location of the tract—can be demonstrated to be false, respondent's entire pretense of an innocent trespass is demolished.

If Mr. Dudley himself (or *any* witness for respondent) had testified, simply, that *Dudley himself* had never consciously realized (or had *forgotten*) the location of the tract as definitely shown by title deeds and maps at all times in his possession, we can conceive the possibility that such testimony might have been accepted, *for what it was worth*. But when we find that instead of relying on such proof of innocence, respondent (throughout the record and by its counsel at oral argument and now in their brief) plants its case specifically on a statement of

Dudley which is demonstrably false, we find complete justification for the Special Master's conclusion that the trespass was "wanton, wilful, or done with a reckless disregard that amounts to wilful trespass." That the statement was false—that is, that Dudley did *not* "always", *or at any time,* have the "impression and understanding, talking with Mr. Tynes, that that tract of land laid over on Trace Fork of Irishman's Creek"—is demonstrated by Tynes' letter to Dudley of February 3, 1923, which definitely and correctly states the true location of the tract as being "in the very head of a right hand branch of Lotts Creek."

Dudley did not have any such "impression" or "understanding" when (on April 20, 1929) he had his engineer, *G. Turner Howard,* make and give Tynes Original Map No. 9, which, however misleading in other respects, clearly shows the 100 acre tract in exactly the same place as described in Tynes' letter to Dudley and as shown on Dudley's Kentucky River Region Map, with the pencil letter "K" placed on the tract by Dudley on February 22, 1923. (This Map No. 9 also verifies the fact, discussed at greater length in the next succeeding sub-heading,, that "Deadening Fork" and "Road Fork" are one and the same—a fact which respondent's counsel appear to question. The map shows, also, along its right hand edge, the title "*Trace Fork of Irishman's Creek*", and demonstrates with totality that the William Kelley 100 acre tract was *not* "over on Trace Fork of Irishman's Creek"). In this connection may we say that the statement or quibble appearing on page 7 of their brief to the effect that petitioner contends that the letter "K", as placed by Dudley at several points on his Kentucky River Region

Map, stands for the petitioner, Kycoga Land Company, which admittedly had not yet come into being, is scarcely in keeping with respondent's counsel's claim to accuracy, in view of the reference made in petitioner's original brief (pages 17-18) to testimony of Mr. Tynes (See Tr. Vol. II, p. 443) that this pencil "K" stood for *"Kountze Brothers"*—the old private banking firm of 120 Broadway, New York, sometimes misspelled "Koontz"—known to Dudley as being dominant in the ownership of the "Bright" and "Richards" lands shown on his map: a circumstance found fully attested in Dudley's letter to Tynes of June 3, 1915 (Tr. Vol. III, p. 67) wherein Dudley inquired of Tynes about the prospect of his (Dudley's) company acquiring "one or two small tracts entirely within our boundaries" from *"your clients Koontz Brothers and Arthur D. Bright"*.

That Dudley could not have thought petitioner's William Kelley 100 A. Tract No. 1671 was on Trace Fork of Irishman's Creek is further borne out by paragraph "3d" of Tynes' letter to Dudley of February 3, 1923, which mentioned "our John M. Bailey Tract No. 1537, containing 53.33 acres, situate for the most part *on the right hand side* of the *Trace Fork of Irishman's Creek,"* and which is approximately 3000 feet east of petitioner's Wm. Kelley 100 acre Tract No. 1671; and so shown on Dudley's personal copy of the Kentucky River Region Map No. 17. A further significant fact is, that if the tract in controversy were in fact located "for the most part on the right hand side of Trace Fork" it would *not* be included *within* and would *not* be *adjacent*, or be *even in close proximity to* the Knott leasehold.

When Dudley's personal copy of the Kentucky River Region map was finally produced before the Master by

respondent's engineer *Howard,* on March 22, 1933, Tynes found (and later testified) that Mr. Dudley had placed the initial "K" and other notations upon the map when, on February 22, 1923, he and Dudley were discussing the possible purchase by respondent of the six tracts mentioned in Tynes' letter to Dudley of February 3, 1923. As heretofore pointed out, in his subsequent testimony before the Special Master, Tynes said that among the tracts upon which Dudley that day placed the initial "K" was "the tract that he told me he had been unable to find in advance of my arrival." Respondent's counsel would use this circumstance as supporting their argument that Dudley was "confused" as to the location of one of the tracts mentioned in Tynes' letter, and that the tract in controversy was that tract. But Dudley himself refuted any such argument and contention when, shortly after receiving Tynes' letter of February 3, 1923, in his own handwriting, in paragraph numbered "4th" of Tynes' letter, he interlined the phrase "Question where he owns": thus testifying for all time that the one and only tract of the six tracts mentioned in the letter, as to whose location he entertained any doubt, was *petitioner's Elihu Brown Tract No. 1507,* containing 47 acres and situate on both sides of Dry Fork of the Kentucky River, in *Letcher* County, about two-thirds of the way up said *Dry Fork* (shaded in green on Map No. 17, at J-20), and *not* petitioner's *100 acre William Kelley Tract No. 1671,* which is situate over ten miles away, in the very head of a right hand branch of *Lotts Creek,* in *Knott* County, Kentucky. The circumstance of Dudley's having grouped together and noted on page 2 of Tynes' letter four of the tracts, containing in the aggregate 302.33 acres, which he proposed to buy from Tynes' client, provided Tynes would take a

91.18 acre tract of his own company in exchange, and that the 100 acre Lotts Creek Tract, the 53.33 acre Trace Fork tract, and the 47 acre Dry Fork tract whose location Dudley had previously been uncertain about, were included in such group, demonstrates that when making this notation on the letter at his conference with Tynes on February 22, 1923 (which was shortly after his long-withheld formal lease to Knott Coal Corporation had been recorded) Dudley definitely understood the location *and appreciated the value to his company* of *each* of said four tracts.

B. Respondent's Argumentative Alternative and Different Location:

Commencing with the bottom of page 2 of their brief respondent's counsel present the novel argument that Tynes' letter to Dudley of February 3, 1923, was calculated to mislead Dudley into thinking that the tract in controversy, as described in paragraph numbered "2nd" of the letter, was situate elsewhere than where it really is, when Tynes described it as being "situated on the very head of a righthand fork of Lotts Creek".

Upon reference to Dudley's Kentucky River Region Map (Original Map No. 17), the Court will find that this William Kelley 100 A. mineral tract No. 1671 is located about three inches to the north of the very center of the map, at a point one inch east of where horizontal index line "N" intersects with vertical index line "15" of the map. The two tracts referred to in paragraph "1st" of Tynes' letter to Dudley of February 3d as plaintiff's Andy Singleton Tract No. 1545 and Samuel Richie Tract No. 1546, will be found shaded in green on the map at a point immediately northeast of the intersection of horizontal line "O" with vertical line "14". The tract re-

ferred to in the "3d" paragraph of Tynes' letter as plaintiff's John M. Bailey 53.33 acre tract No. 1533 will be found shaded in green on the map at a point immediately northwest of the intersection of horizontal "E" with vertical line "16". On each of said four tracts, numbered 1671, 1545, 1546 and 1533, the Court will note a lead pencil "K" superimposed over the green tinting of the respective tracts. According to the testimony of respondent's Vice-President and Chief Engineer *Howard,* these lead pencil K's were on the map when he first produced it before the Master in the winter of 1932-33. Upon close scrutiny the Court will observe a lead pencil circle or loop around these tracts, or most of them. Counsel here speak from memory. While these loops and letters "K" are now scarcely discernible, the Court will note from Howard's testimony that they were plain enough when he produced and testified about the map before the Master (R. Vol. II, p. 311). As heretofore pointed out these "K's" stand for "Kountze", and were placed on the map by Mr. Dudley, (in Dudley's office, on February 22, 1923) when he and Mr. Tynes were checking and verifying the various tracts embraced in Tynes' letter to Dudley of February 3, 1923, by this very map. Upon referring to "Appellant's Composite Oral Argument Map" the Court will note that the tract shaded in green is the form in which the Slemp letter (See our original brief, pages 2 (bot.) and 24) and enclosed map (Original Map No. 1) to Hager of December 21, 1906 proposed that the Kelley-Bright tract take, which is the identic form in which it appears on the Kentucky River Region Map; and that the tract in controversy did not asume the form in which laid down on the oral argument map in fringed red outline until after the Kelleys had made the confirm-

atory deed to plaintiff's grantors, Webb & Hoppin, of June 5, 1911. (Tr. Vol. III, p. 22).

At R. Vol. II, page 445, *Tynes,* in referring to his conference with Dudley on February 22, 1923, and to his letter to Dudley of February 3, 1923, testified:

> "He told me that he had been able to locate all of the tracts mentioned in my letter except one little tract—just what, I don't recall; but he had some notations on the letter. My recollection is that it was probably the smallest tract in the bunch. He got out the Kentucky River Region Map (Original Maps, No. 17), a copy of which I had with me also, being the map that was exhibited to the Court by the witness, G. Turner Howard, at the last hearing before the Master at Lexington, after two or three efforts to get this map produced. We then went seriatim through the tracts enumerated in my letter. Mr. Dudley marked them on his map, and on each tract the initial of our company as indicating the tracts referred to in my letter. Among other tracts that he made our initial on was the tract in controversy in this case, and on all of the tracts mentioned in the letter, including the tract that he told me he had been unable to find in advance of my arrival."

Defendant's counsel argued at the hearing that the description of the tract in question, as given in the second paragraph of this letter to Dudley of February 3, 1923, misled Mr. Dudley. With Dudley's Kentucky River Region Map (No. 17) before it the Court can see for itself that Tynes' description of the William Kelley Tract No. 1671 as being "situated in the very head of a right hand branch of Lotts Creek" is letter-perfect. The Court will observe that commencing two inches west of the tract is the title "Lotts Creek", and that the small branch upon which the tract is actually located is in fact "a right hand branch of Lotts Creek", *as shown on this*

map—the map Tynes and Dudley had before them; and that the tract is literally "*in the very head* of said right hand branch.

The locality contended for by respondent's counsel as answering Tynes' above quoted descriptive location of the tract and as being "one mile away" (to the northeast), is *not* "the very head of a right hand branch of Lotts Creek" as shown on *this* map, which is the map from which the description of the tract contained in his letter to Dudley was taken by Tynes, or (as pointed out in the parenthetical text near bot. p. 4 supra) as shown on the respondent's engineer Turner Howard's map (Original Map No. 9). The error of respondent's counsel may arise from the fact that other maps of record in this cause, notably defendant's Fox, Peck & Pursifull map (Original Map No. 11), instead of designating the main right hand fork as "Lotts Creek", as does the Kentucky River Region Map, designates it as the "Kelley Fork of Lotts Creek". From that false premise, seemingly, they argue that Tynes' letter-location of the tract places it on the head of *their* so-called right hand or Kelley Fork (or "branch") of Lotts Creek. But, as previously stated, Tynes' letter-description of the tract is in exact accord with the nomenclature used on the Kentucky River Region map, which is the one and only map he and Dudley had before them when considering Tynes' letter to Dudley; *and Dudley could not possibly have been misled thereby.* Tynes' letter plainly describes the tract as "our Wm. Kelley Tract No. 1671" which definitely locates it on Dudley's map as being exactly where it is, and where the map shows it to be, and *not* "about a mile away" (to the northeast). *That* locality is shown by the Kentucky River Region map to be entirely en-

compassed by respondent's own tract No. 1171, tinted brown and hatched with black diagonal lines, situate two inches to the northeast of petitioner's William Kelley Tract No. 1671 and listed on the legend of the Kentucky River Region Map as "Slemp Coal Company's Fernando C. Roark Fee Tract". Even if Dudley believed the tract in controversy to be so located, it would still be *within* (or partially so) the exterior bounds of his lease to Knott Coal Corporation, as is clearly demonstrated by reference to the corresponding locality on the extreme eastern end of the full length blueprint of the Fox, Peck & Pursifull map (Original Map No. 11) upon which defendant's witness Howard, at the request of the Special Master, marked out the exterior bounds of the Knott leasehold in green crayon. In this connection the Court's attention is directed to the significant fact that Dudley testified (Tr. Vol. II, p. 66) that in negotiating the lease to Knott he determined the exterior bounds of the Knott leasehold from this Fox, Peck & Pursifull map.

TOPIC II
RESPONDENT'S WOULD-BE PLEA (AND PROOF?) OF ESTOPPEL.

Commencing at the bottom of page 3, and again in "Point 3", page 12 of their brief, respondent's counsel undertake to meet the argument, presented in "Point III", page 42 of petitioner's brief, that respondent failed either to allege or prove acts and conduct upon the part of petitioner which, under the controlling Kentucky law, would absolve respondent from the larger measure of damages.

While by its amended answer of January 8, 1934, filed five months after the Master had returned his report, and which is the basis of petitioner's Assignment of

Error numbered "(3)" (Tr. Vol. I, p. 207), respondent pleaded the circumstance of petitioner having (on April 25, 1930, a year after the trespass had been committed) made a lease (Original Papers Nos. 59 and 60) of its remaining unmined coal to respondent's lessee, Knott Coal Corporation, as commiting petitioner to some sort of an "adoption" of respondent's lease to Knott Coal Corporation, thus in some manner estopping petitioner from claiming the larger measure of damages, the fact remains that in *none* of its pleadings did respondent *plead* or in any manner rely upon, or *prove* or *assume* to prove, any conduct upon the part of petitioner, either contemporaneous with or anteceding the commission of the trespass, as constituting an estoppel against petitioner's right to recover the larger measure of damages.

TOPIC III
RESPONDENT'S CLAIM THAT TRESPASS WAS INNOCENT BY REASON OF AN ALLEGED "CONFUSION OF TITLE."

At pages 14 and 15 of their brief respondent's counsel state that the title issue was "difficult of decision", basing their statement, seemingly, on the characteristic exhaustiveness and length of Judge Cochran's opinion on that issue. We submit that this Court will find that Judge Cochran had not the slightest difficulty in finding that respondent did not own the tract in controversy, and had no color of title thereto, and that the petitioner did and does own it. There is nothing in the opinion to sustain, but on the contrary the findings and conclusions of Judge Cochran wholly refute, respondent's counsel's statement that Judge Cochran found that Kentucky River Coal Corporation had no knowledge, or was not chargeable with knowledge, of the transactions (from 1905-1911)

between the Slemp and Bright interests which culminated in the recognition and ratification by the Slemp Companies of Bright's ownership of the tract in controversy. Respondent's attitude throughout the record on this title issue, including its indecision and conduct generally with respect to the prosecution of an appeal from Judge Cochran's opinion, will be found to be eloquent of the fact that respondent at no time entertained any hope that it could show either title or color of title to petitioner's tract, just as Judge Cochran found it had not done; and that respondent injected the principle of "confusion of title" in the case as a smoke screen to obscure acts and conduct otherwise plainly discernible as "wilful and wanton".

The facts of the two cases cited on pages 14 and 15 of respondent's brief are in no wise analogous to the facts of the case at bar. The *Middle Creek* case involved the driving by the defendant of its coal-mining entries into a one-acre tract of land which the plaintiff claimed to own by reason of a reservation contained in a deed conveying a 274 acre tract of land which reads—

> "One acre reserved on the grave yard point, beginning at a small black pine standing on the Southwest end of the point about thirty-five steps from the grave of James P. Harris, Sr., thence running",

by various and sundry similar designated calls, to the beginning. The court found that not only had the mining company caused the one-acre reservation to be surveyed and mapped by a competent engineer (although incorrectly so, as the court determined), but that when interpreted by the case law of Kentucky the mining company was justified in construing the reservation as being not of the coal underlying, but merely of the cemetery rights

with respect to, the surface of the reservation. In other words, that case involved both a "confusion" as to the correct location of the boundary line of the reservation and as to the language of the reservation itself.

The *Blackberry-Kentucky* case cited by respondent was the second appearance of the case in the Court of Appeals of Kentucky. Upon reference to the decision of the court in the former appearance (212 Ky. 64, 278 S. W. 173), the Court will note that the Kentucky court found that neither the plaintiff nor defendant had good title of record to the 80 acre parcel of land trespassed upon by defendant (defendant's title to the tract having been sustained by adverse possession); that said 80 acre parcel was made up of two gores of land which had their existence in the correct interpretation and location of the lines of six different patents which, taken together, were found to cover the tract; that defendant had exercised the utmost good faith in locating the lines of these conflicting patents—correctly so, as defendant believed—and that as a consequence of its good faith efforts in the premises, defendant's acts of trespass upon the tract were excusable, or, in the language of the court, upon the second appearance of the case as cited by respondent, immediately preceeding the excerpt from the court's opinion found reproduced on page 14 of respondent's brief—

> "The record discloses that Chloe A. Hatfield and others (lessors) were in utmost good faith in their belief that they were owners of the 80 acres of land in dispute, and their lessees were likewise in utmost good faith in their belief that this disputed land had been leased to them and that they had the right under their lease to take the coal from it."

There are no elements in the case at bar which admit of the application of the principal of "confusion of title" by which the two cases just mentioned were controlled. The trespass in the case at bar was in no sense attributable to uncertainty as to the interpretation of a deed or as to the location of the tract of land described in it, or of any other tract or tracts of land, for that matter. The record discloses not the slightest issue with respect to any part of the common boundary line between petitioner's 100 acre tract and lands of the respondent which adjoined petitioner's tract throughout almost its entire periphery. The tract was either wholly petitioner's or wholly respondent's. Judge Cochran encountered no difficulty in finding that the entire tract belonged to petitioner. The only issue before this Court is, in view of Judge Cochran's opinion and the ensuing record of the case, whether the respondent had knowledge, *or was chargeable with knowledge,* that *petitioner* owned, or that *it itself* did *not own,* the tract. Nothing more, nothing less.

TOPIC IV
A FURTHER OBSERVATION UNDER POINT VI, PAGE 53, OF PETITIONER'S ORIGINAL BRIEF.

At page 17 of respondent's brief appears this vitally important and erroneous statement:

> "We find no case where a *landlord* has been held liable except as an innocent trespasser".

In our original brief we cited the case of *Thompson, et. al.* v. *Dentzell, et. al.,* 232 Ky. 755, 24 S. W. (2d) 607, as being just such a case. In view of the importance of the case, which remains the law of Kentucky on the point, and of the fact (as evidenced by this statement of counsel) that the full significance of the court's opinion

may be grasped only by reading the court's opinion in a former appearance of the case in the Court of Appeals of Kentucky (*Jim Thompson Coal Co.* v. *Dentzell,* 216, Ky. 160, 287 S. W. 548), we have presumed to work out and give the Court this brief resume of the facts and holdings in both cases.

Sometime prior to 1922 Mrs. Sallie Thompson, wife of Jim Thompson, who was owner of a coal lease upon the coal land of another, made a sub-lease of the property to her husband, who operated the lease as Jim Thompson Coal Company. In 1922 and 1923 the coal company, in prosecuting its coal mining operation on its own leasehold, extended its entries into the lands of one Dentzell, and mined and removed therefrom over 3,000 tons of Dentzell's No. 9 seam of coal. In a suit (the former of the two) brought to determine the damages accruing to Dentzell, the Court held that inasmuch as Mrs. Thompson's sub-lease to her husband's company did not include the Dentzell tract she was in no wise liable for the company's trespass, which, under the circumstances obtaining, the court found to have been a wilful one, for which the Jim Thompson Coal Company was required to respond in damages on the basis of the market value of the coal it had mined from the Dentzell tract—or approximately $2.00 per ton. The Jim Thompson Coal Company went out of business after this judgment was entered against it, as had the two or three companies before it which had unsuccessfully conducted mining operations on the property under a sub-lease from Mrs. Thompson. The Drakesboro Coal Company was Mrs. Thompson's next sub-lessee of the property, but it too soon passed out of the picture, when Mrs. Thompson's husband again took a sub-lease from his wife in the name of Puritan Coal

Company, of which he was president and general manager. In September, 1925 the lease was turned over to the Rogers Coal Company, whether by sub-lease from Puritan Coal Company or from Mrs. Thompson is not clear. Rogers Coal Company operated the property from October, 1925 until after June, 1926. In June, 1926, Dentzell, having discovered that the operations under the Thompson lease had again been extended into his coal, brought the second of the two suits against Rogers Coal Company, Sallie Thompson and J. M. Thompson, jointly, and was awarded a judgment against the Rogers Coal Company in the sum of $5,520. for the 4,600 tons of coal extracted by it from Dentzell's land between September, 1925 and June, 1926; against J. M. Thompson in the sum of $10,792.60, for 8,993 tons extracted by him and the Puritan Coal Company from Dentzell's land during the time they were operating the lease, and against Sallie J. Thompson for both amounts. Upon appeal from that judgment, the Kentucky Court of Appeals found that while Mrs. Thompson had been exonerated from all liability upon the facts obtaining in the former of the two cases, she could not escape under the facts found in the latter, and accordingly affirmed the judgment rendered aganst her in the lower court *for the full market value after being mined* of *all coal mined* from Dentzell's land by *both* the *Puritan Coal Company* and *Rogers Coal Company.*

This is the only case on this precise point that our research has disclosed. We submit, with all earnestness, that the case is the law of the case at bar, albeit it may stand alone.

TOPIC V
MISCELLANEOUS CLARIFICATIONS OF FACT.

By way of curing, if such be needed, petitioner's failure to refer to the record for support of certain statements made in the first paragraph of petitioner's narrative of "The Salient Facts", on page 14 of the petition, adverted to in the first literary paragraph of main paragraph numbered "IV" of respondent's brief, suffice it to say:

1. The Bufords' Engineer, *D. T. Mitchell,* later General Manager of their subsequently formed company, Knott Coal Corporation, testified (Tr. Vol. II, pp. 372-3) as follows:

> "I ran the outcrop of the No. 9 seam of coal about 1919, *or in 1918,* all around . . . in that country generally . . ., not only on that lease but on adjacent property. I was sent there by Mr. Buford to find out what body of coal we could get together in one contiguous body of this No. 9 seam that could be mined from a point on the other creek. I ran, oh, several hundred acres over and above what we had on this lease . . . In fact the Wisconsin lease was included in that survey, and a lot of Mr. Hardaway's land down to the mouth of Irishman; and the map then was entitled 'Map of No. 8 (what we called it then) Outcrop on Carr's Fork & Lott's Creek' . . . The work that we did in getting together the information the Bufords wanted for the purpose of determining whether or not they would be interested in making this lease, was paid for by Mr. W. S. Dudley, President of the Kentucky River Coal Corporation."

2. Knott's President, *Mr. Hugh Buford,* testified that he participated in the negotiations that led up to the taking of the lease from respondent to his company (Tr. Vol. II, p. 109); *that they took the lease entirely on the No. 9 seam;* that from the openings they made in the

No. 9 seam *"the coal was demonstrated as of exceptional height* (thickness) *for our entire field"*; that at the time of these negotiations he was Manager of Ashless Coal Corporation, of which his father (Mr. L. N. Buford) was president (*Idem* p. 110, commencing near top); that the prospecting of the leasehold was done under his general supervision. "All the work done by us in the way of surveying was done by Mr. Mitchell, for the purpose, and the only real purpose, of determining the approximate acreage of the No. 9 seam in that territory that the Kentucky River Coal Corporation proposed to lease to us." (*Idem* p. 111).

3. The statement appearing on p. 14 of our original brief, namely, that as at the time when the above mentioned negotiations between the Bufords and Mr. Dudley were first inaugurated (*not* when, later on, the lease in consequence of such negotiations was consummated, as counsel, at page 6 of respondent's brief, "times" said statement), respondent owned less than two-thirds of the acreage (of the No. 9 seam which the Bufords had under surveilance as being desirable and essential to economic development) is an under rather than over-statement. As heretofore pointed out, respondent did not own the *Franklin,* the *Litz,* the *Watts* or *Hardaway* tracts, and, of course, the 100 acre tract in controversy. Respondent's (and before it Mr. Slemp's) land agent of twenty-five years standing, *E. C. Holliday,* testified that in the spring of 1919 respondent did not own, but in his judgment should acquire, the *Katherine J. French* tract (See Original Map No. 11), which contained 375 acres, nor *"two tracts on Sassafras Creek"*; and that he told respondent's Chief Engineer Howard so (Tr. Vol. III, p. 429). The Katherine J. French tract and one of the two Sasafras

Tracts (namely, the so-called *H. H. Smith* Tract of 202.46 acres, which was owned at that time by the Hardaway interests (See Original Map No. 11) were later acquired and included in respondent's original letter-lease to Knott of August 2, 1919. Reference to Dudley's Kentucky River Region Map (Original Map No. 17), shown to have been revised as at 1911, serves to demonstrate the embryonic state of respondent's ownership in that territory as of that date, while the testimony of witnesses above adverted to shows that of the approximately 2500 acres which were included in the ultimate lease of respondent to the Bufords (and in respondent's undertaking to acquire and add certain tracts to that lease), respondent, at the beginning of its negotiation with the Bufords, *owned less than 40%.*

4. As regards the statement appearing near the bottom of page 4 of respondent's brief: The record neither shows nor intimates that "terms had been reached" between petitioner and Knott Coal Corporation as a condition precedent to (or post) its dismissal of the the cause as to that Company on August 7, 1933, (which was after the Master had prepared but had neither filed nor divulged his findings) as counsel for respondent well know and as the voluminous record of the events leading up to the execution by petitioner to Knott Coal Corporation (on April 25, 1930) of a lease on the coal remaining unmined in its 100 acre tract after the termination of the trespass attests. (For lease See Original Papers, No. 59; and for an ancillary agreement of the same date see Original Papers, No. 60). For three long years after the execution of these two instruments petitioner prosecuted this suit against respondent and Knott Coal Corporation jointly, and took a non-suit as to Knott only because its counsel

had become convinced that the trespass was an innocent one so far as Knott was concerned, and for the further reason that its counsel had come to the conclusion that under the Kentucky law petitioner could not sustain a decree in equity which fixed a different measure of damages against two joint trespassers for one and the same act of trespass.

TOPIC VI

THE ERROR OF BOTH THE DISTRICT AND CIRCUIT COURTS DERIVES FROM THEIR FAILURE TO ABIDE ESTABLISHED KENTUCKY CASE LAW, RATHER THAN FROM THEIR REJECTION OF THE MASTER'S FINDINGS OF FACT.

We adhere to the thesis advanced in "Point V", page 47, of our original brief, viz: That the so-called two-court rule finds support in reason only when the District Judge, through having heard and observed the witnesses testify, has had the same opportunity of judging of their credibility as did the Special Master.

Respondent's counsel appear to lean heavily (pp. 16 and 17 of their brief) upon this excerpt from Circuit Judge *Simons'* opinion:

> "The master's findings of fact are here based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him."

The pertinent text of the Master's report is found reproduced at pp. 7 and 8 of our original brief, wherein the Master is shown to have *found* (or reached the conclusion, based on inference, as Judge *Simons* chooses to regard it) that the trespass was "wilful": *Wilful* under the case law of Kentucky ruled upon like facts and situations.

The Kentucky cases found cited in our original brief

illustrate beyond per adventure, we submit, that knowledge, or *means of knowledge* that the trespasser may not be permitted to pass up unheeded, are of like potency and effect in determining the quality of the trespass; and that only where acts and conduct of the true owner, specifically alleged and positively proven, are demonstrated to have actively induced the acts constituting the trespass, may the trespass be deemed otherwise than wilful.

Near the bottom of page 10 of our original brief we made passing reference to this highly important statement found in the opinion of District Judge *Ford*:

> "Although it is not shown by the evidence that Mr. Dudley was *fully* aware of the *definite* or *exact* location of the boundary lines" of petitioner's tract, "it can *scarcely be doubted* that *at all times he knew* this land was *located somewhere within* the vast territory embraced in the lease. The correspondence which passed between Mr. Dudley and Mr. Tynes, together with testimony of Mr. Tynes relative to their negotiations for the sale to defendant of various tracts owned by the plaintiff, *including the tract in question, clearly demonstrates* that *both* parties *well understood* that the lease to the Knott Coal Corporation *embraced the land in question*". (Tr. Vol. I, center p. 177) (Italics supplied).

At Point "(5)", p. 28, of our original brief we referred to statements of similar import appearing in the opinion of Circuit Judge *Simons,* which read (Italics supplied):

> "It may well be that the appellee (respondent) *did not exercise due care to ascertain the limits of its property* beyond which it should not have permitted the operations of its lessee to go." (Tr. Vol. III, near bot. p. 130).

"Whether Dudley . . . knew *precisely where* the plaintiff's 100 acres were located is not clear . . . He *testified* he did not know. That it was *somewhere within the outer boundary* of the leased premises he probably *did know.*" (Idem, bot. p. 131).

"As found by the District Judge, the correspondence between Dudley and Tynes relative to negotiations for the sale of various tracts owned by plaintiff, *including the tract in question,* demonstrates that *both* parties understood that the lease to Knott *embraced the land here involved.*" (Idem, bot. p. 132).

"Guilty of negligence Dudley may have been in speculating upon his ability to purchase the property from the plaintiff; guilty of negligence he may have been in failing to follow Knott operations in the region of the plaintiff's land closely enough so as to prevent Knott's entry thereon before he had *concluded* the *purchase* of *the property.*" (Idem, near top p. 133).

Thus is it demonstrated, that the finding of Special Master *Menzies,* District Judge *Ford* and Circuit Judge *Simons* were uniform in respect of this one controlling fact: Knowledge, *actual knowledge,* upon the part of the corporate respondent—through its deeds, its maps and other title papers and corporate records, and through its President, *Dudley,* its Vice-President and Chief Engineer, *Howard,* and its land agent, *Holliday* (and its Engineer William *Pursifull,* who testified at Tr. Vol. II, p. 103, that as far back as 1916, when doing some surveying in the territory for respondent, he told respondent's President and its abstractor and agent J. B. Hoge, that respondent did not own the tract in controversy)—that petitioner's 100 acre tract was included in respondent's lease to Knott Coal Corporation. From all of which it follows, as is somewhat more fully brought out in our Petition for Rehearing of the cause by the Circuit Court of Appeals

(Tr. Vol. III, pp. 138-40), that the principal error in the premises derives *not* from the fact that "the Master's findings are based wholly upon inference", as stated by Circuit Judge *Simons* (Tr. Vol. III, p. 130, just above center), or are but the "mere dogmatic conclusion on the part of the Special Master", as stated by respondent's counsel (bot. p. 9 of their brief); and *not* from the fact that the District and Circuit Courts found this all-controlling fact *contra* the finding of the Special Master: *but from the fact that both those courts failed utterly to impose upon their own and the master's like finding the inescapable legal consequences imposed upon such facts and situation by the decided cases of the Court of Appeals of Kentucky.*

Compare, apropos respondent's invocation of the two-court rule, the recent case of *United States* v. *Appalachian Electric Power Co.,* 85 L. Ed., 201, 206, where this Court, speaking through Mr. Justice *Reed,* said:

> "There is no real disagreement between the parties here concerning these physical and historical evidentiary facts" (in that case facts showing "navigability", in the case at bar the "quality of the trespass"). "But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the *ultimate* conclusion upon navigability to be drawn from the uncontroverted evidence.
>
> "The respondent relies upon . . . the conventional rule that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown * * * When we deal with issues such as these before us, facts and their constitutional" (in the case at bar, Kentucky case law) "significance are too closely connected to make the two-court rule a serviceable guide . . . Both the *standards* and the *ultimate*

conclusions involve questions of *law inseparable from the particular facts to which they are applied.*"

Respectfully submitted,

JOSEPH S. GRAYDON,
Cincinnati, Ohio.
BUFORD C. TYNES,
Huntington, West Va.,
Attorneys for Petitioner.

CADWALADER, WICKERSHAM & TAFT,
New York City,
MAXWELL & RAMSEY,
Cincinnati, Ohio,
Of Counsel for Petitioner.

Cincinnati, Ohio,
January 29th, 1941.